Supreme Court, U.S.
FILED
JAN 28 1999
CLERK

No. 98-1033

In The

Supreme Court of the United States

October Term, 1998

SHARI BAIR, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF C. W. BAIR, ET AL.,

Petitioners,

v.

WILLIAM FRED HAGANS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Fourteenth Court Of Appeals Of Texas

BRIEF OF RESPONDENT WILLIAM FRED HAGANS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

RICHARD A. SHEEHY
Counsel of Record

MCFALL, SHERWOOD & SHEEHY, P.C.
2500 Two Houston Center
909 Fannin Street
Houston, Texas 77010-1003
(713) 951-1000 [Telephone]
(713) 951-1199 [Telecopier]

Attorneys for Respondent William Fred Hagans

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22pp

QUESTIONS PRESENTED

1. Whether the refusal by a state court of appeals to consider an issue on the merits violates due process when the party raising that issue fails to comply with a state rule of appellate procedure that requires the party to make proper citations to the record and legal authorities.

2. Whether a party suffers a violation of due process when the district clerk ultimately files a complete record with the court of appeals, and the party fails to cite the court of appeals to places in the record that support his position on appeal.

3. Whether the procedure in Texas state courts for summary judgments, which is substantially the same procedure as in federal court, violates a party's federal constitutional right to a trial by jury.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings set out in the petition for writ of *certiorari* are accurate with one exception. Petitioners raised a complaint against the law firm of Hagans & Sydow in the trial court, but omitted the firm as a Defendant in Plaintiffs' Third Amended Original Petition which was the controlling pleading at the time the trial court ruled on the motions for summary judgment. (Tr. 2). Under Texas law, the omission of a party defendant in a pleading acts as a dismissal of that party. *Evans v. Hoag*, 711 S.W.2d 744, 746 (Tex. App. – Houston [14th Dist.] 1986, writ ref'd n.r.e); *Burton v. Bridges*, 641 S.W.2d 635, 637 (Tex. App. – El Paso 1982 writ ref'd n.r.e.). As a result, Hagans & Sydow should no longer be a party to this case.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Rules of Court 2

Statement of the Case 3

Argument 7

1. The state court of appeals did not violate any due process rights of Petitioners by refusing to consider arguments that failed to meet usual and necessary rules of appellate procedure 7

2. Petitioners cannot avoid their duties under former TEX. R. APP. P. 74 by blaming the district clerk 12

3. Plaintiffs have no federal constitutional challenge to the Texas rule on summary judgment 14

Conclusion and Prayer 16

TABLE OF AUTHORITIES

Page

CASES

Burton v. Bridges, 641 S.W.2d 635 (Tex. App. – El Paso 1982 writ ref'd n.r.e) ii

Carraba v. Employers Casualty Co., 742 S.W.2d 709 (Tex. App. – Houston [14th Dist.] 1987, no writ) 15

Casteel-Diebolt v. Diebolt, 912 S.W.2d 302 (Tex. App. – Houston 1995, no writ) 7

Colgrove v. Battin, 413 U.S. 149 (1973) 14

Dryer v. Greene, 871 S.W.2d 697 (Tex. 1993)..... 14

Evans v. Hoag, 711 S.W.2d 744 (Tex. App. – Houston [14th Dist.] 1986, writ ref'd n.r.e)..... ii

General Motors Acceptance Corp. v. Harris County Municipal Utility District, 899 S.W.2d 821 (Tex. App. – Houston [14th Dist.] 1995, no writ)..... 14

Guillen v. DeLeon, 887 S.W.2d 503 (Tex. App. – San Antonio 1994, no writ) 13

Hamblin v. County of Los Angeles, 803 F.2d 462 (9th Cir. 1986) 9

Henry S. Miller Management Corp. v. Houston State Associates, 792 S.W.2d 128 (Tex. App. – Houston [1st Dist.] 1990, writ denied)..... 10

Johnson v. State Farm Mutual Automobile Insurance Co., 762 S.W.2d 267 (Tex. App. – San Antonio 1988, writ denied)..... 10

TABLE OF AUTHORITIES – Continued

Page

McGoldrick Oil Co. v. Campbell, Athey & Zukowski, 793 F.2d 649 (5th Cir. 1986) 8

Mitchell v. General Electric Co., 689 F.2d 877 (9th Cir. 1982) 8, 10

N/A Corporation v. Liberty Mutual Insurance Co., 127 F.3d 1145 (9th Cir. 1997) 9

Okere v. Apex Financial Corp., 930 S.W.2d 146 (Tex. App. – Dallas 1996, writ denied) 13

Pearson v. Yewdell, 95 U.S. 294 (1877) 14

Security and Exchange Commission v. Thomas, 765 F.2d 825 (10th Cir. 1992) 8

Singleton v. Wulfe, 428 U.S. 106 (1976) 14

Slack v. St. Louis County Government, 919 F.2d 98 (8th Cir. 1990) 9

Swafford v. Holman, 446 S.W.2d 75 (Tex. Civ. App. – Dallas 1969, writ ref'd n.r.e.) 15

Young Brothers & Co. v. Cigna Worldwide Insurance Co., 882 F.Supp. 1468 (E.D. Pa. 1994) 15

RULES AND STATUTES

28 U.S.C. § 1257 1

28 U.S.C. § 2101(c) 2

4th Cir. L.R. 28(g) 9

5th Cir. L. R. 28.2.3 9

7th Cir. L.R. 28(c) 9

TABLE OF AUTHORITIES – Continued

Page

9th Cir. L. R. 28-2.3 9

FED. R. APP. P. 28(a)(4) 9

FED. R. CIV. P. 56 15

SUP. CT. R. 13 2

SUP. CT. R. 14.1(g) 4

SUP. CT. R. 15.2 3

TEX. R. APP. P. 35.3(a) 13

TEX. R. APP. P. 50(d) 13

TEX. R. APP. P. 52(a) 14

TEX. R. APP. P. 74 ..... *passim*

TEX. R. APP. P. 38.1 8

TEX. R. CIV. P. 166a 14, 15

MISCELLANEOUS

10A Wright, Miller & Kane, *Federal Practice & Procedure* §§ 2711, 2714 (1998) 15

Final Approval of Revisions to the Texas Rules of Appellate Procedure (August 15, 1997) 13

BRIEF OF RESPONDENT WILLIAM FRED HAGANS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE UNITED STATES SUPREME COURT:

Respondent William Fred Hagans ("Mr. Hagans"), files this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners Shari Bair, Individually and as Representative of the Estate of C.W. Bair, et al. ("Petitioners").

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourteenth Judicial District of Texas is unpublished, but it is printed as an appendix to the petition for writ of *certiorari*. (Pet. at Appendix A). The Supreme Court of Texas denied the petition for review of that opinion, and also denied the motion for rehearing. (Pet. at Appendices B, C).

JURISDICTION

Mr. Hagans agrees that this Court has jurisdiction under 28 U.S.C. § 1257, although Mr. Hagans does not believe the Court should exercise that jurisdiction to consider the petition for writ of *certiorari*. Further, Mr. Hagans would point out that the original petition for writ of *certiorari* was filed on or about October 29, 1998; however, it apparently had some missing pages and errors,

and the clerk of the Court advised Petitioners that they could file an amended petition that corrected those errors. Petitioners did not file their final petition for writ of *certiorari* until December 22, 1998, almost two months later. Under these circumstances, Mr. Hagans questions whether the petition for writ of *certiorari* was filed timely. SUP. CT. R. 13; 28 U.S.C. § 2101(c).

RULES OF COURT

Petitioners have set forth a number of constitutional provisions, statutes, and rules of Court in the petition for writ of *certiorari*. However, the opinion below was based almost entirely on former TEX. R. APP. P. 74. For some reason, Petitioners did not include that rule in their petition. The relevant portions of former Rule 74 are as follows:

RULE 74 REQUISITES OF BRIEFS

(d) **Points of Error.** A statement of the points upon which an appeal is predicated shall be stated in short form without argument and be separately numbered. In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found . . .

(f) **Argument.** A brief of the argument may present separately or grouped the points relied upon for reversal. The argument shall include: (1) a fair, condensed statement of the facts pertinent to such points, with reference

to the pages in the record where the same may be found; and (2) such discussion of the facts and authorities relied upon as may be requisite to maintain the point at issue . . .

STATEMENT OF THE CASE

Given the disposition of this case by the Texas court of appeals, and the issues raised in the petition for writ of *certiorari*, Mr. Hagans does not believe it is necessary or appropriate to set forth in detail the facts of this case on the merits. The Texas court of appeals affirmed the judgment of the trial court because Petitioners failed to comply with the Texas Rules of Appellate Procedure. The petition for writ of *certiorari* challenges that procedural ruling; as a result, Mr. Hagans will limit his discussion in this response to the procedural issues raised by Petitioners in this Court. The opinion by the Texas court of appeals correctly states the nature of the case. (Pet. at Appendix A).

Regardless, given the admonition by the Court in SUP. CT. R. 15.2, Mr. Hagans rejects and denies any allegation that he breached any duty or conspired in any way to harm Petitioners. Mr. Hagans did what every lawyer is supposed to do: cooperate with a state bar association in its investigation of alleged unethical conduct. He should be commended for his conduct, rather than be subjected to unsupported and unprofessional attacks. The state trial court properly granted a summary judgment to him.

Consistent with their practice in the Texas appellate courts, Petitioners do not include in their petition here "a

concise statement of the case setting out the facts material to consideration of the questions presented." SUP. CT. R. 14.1(g). Instead, they engage in a rambling and unsupported attack on the district clerk of Harris County and Respondents. They avoid the procedural history of the case that is the basis for the decisions of the state appellate courts. For purposes of the issues raised in the petition for writ of *certiorari*, the Court should take note of that procedural history:

(1) On February 21, 1995, Petitioners perfected their appeal in the state court of appeals.

(2) On March 22, 1995, Petitioners filed the original transcript of four volumes. Under former TEX. R. APP. P. 74(k), their brief was due in the court of appeals on or before April 21, 1995.

(3) On April 21, 1995, Petitioners moved the court for an additional 60 days in which to file their brief. The court of appeals granted the motion and ordered Petitioners to file their brief on or before June 5, 1995.

(4) On June 5, 1995, Petitioners moved the court for an additional 90 days in which to file their brief. The court of appeals granted the motion in part and ordered Petitioners to file their brief on or before August 4, 1995.

(5) On August 3, 1995, Petitioners moved the court for an additional 30 days in which to file their brief. The court of appeals granted the motion and ordered Petitioners to file their brief on or before October 2, 1995, with the notation there would be no further

extensions of time. The court granted Petitioners 30 days more than they requested.

(6) On October 2, 1995, Petitioners moved the court for an additional two days in which to file their brief. The court of appeals granted the motion.

(7) On October 4, 1995, Petitioners finally filed their initial brief in the state court of appeals.

(8) On December 6, 1995, Respondents Sewell & Riggs, Barry Abrams and William Matthews filed their brief in the court of appeals. At that time, they raised the argument that Petitioners had waived their complaints on appeal because Petitioners did not include references to the record in their statement of facts and argument. These same arguments were made shortly thereafter in the briefs filed by the other Respondents including Mr. Hagans.

(9) On March 4, 1996, Petitioners filed their motion to supplement the record with various documents from the trial court, including the motions for summary judgment that were the focal point of the appeal. This motion for leave to supplement the record was filed three months after certain Respondents pointed out the deficiencies in the record. It was also five months after Petitioners filed their initial brief in the court of appeals to challenge the rulings by the trial court. The court of appeals granted the motion, and ordered Petitioners to supplement the record by April 4, 1996.

(10) On April 3, 1996, Petitioners moved the court for an additional 30 days in which to file the supplemental transcript. The court of appeals granted the motion.

(11) On April 19, 1996, Petitioners filed their amended motion to extend time to file the supplemental transcript and also requested leave to file an amended brief to include the missing citations to the record. The court of appeals granted the motion and ordered the supplemental transcript and amended brief filed on or before May 20, 1996.

(12) On May 20, 1996, Petitioners moved the court for an additional 21 days in which to file the supplemental transcript and amended brief. The court of appeals granted the motion, and ordered the supplemental transcript and amended brief filed on or before June 21, 1996.

(13) On June 21, 1996, Petitioners filed eight volumes of a supplemental transcript and their amended brief. The amended brief was filed 14 months after their brief was due in the court of appeals under the state rules.

(14) On July 19, 1996, Petitioners filed their motion for leave to file another supplemental record to include additional items in the record. The court of appeals granted the motion.

(15) On November 13, 1996, the court of appeals heard oral argument in the case.

(16) On May 29, 1997, the court of appeals issued its opinion and judgment. At no

> time between oral argument and the date of judgment did Petitioners seek leave of court to amend their brief a second time.

The court of appeals held that Petitioners waived their arguments on appeal because they failed to meet the requirements of former TEX. R. APP. P. 74. In particular, they did not adequately brief their points of error, and did not cite the court to relevant pages in the record and supporting legal authority. (Pet. at Appendix A at 4), *citing* TEX. R. APP. P. 74; *Casteel-Diebolt v. Diebolt*, 912 S.W.2d 302 (Tex. App. – Houston 1995, no writ). The court concluded that Petitioners had "wholly fail[ed] to adequately present their contentions on appeal," even after four extensions of time to file their brief. (*Id.* at 5-6). The Texas Supreme Court granted Petitioners two extensions of time to file their petition for review, but declined to review the judgment of the court of appeals. (Pet. at Appendices B, C).

ARGUMENT

1. The state court of appeals did not violate any due process rights of Petitioners by refusing to consider arguments that failed to meet usual and necessary rules of appellate procedure.[1]

This case is simply not appropriate for review by this Court. This case presents a classic situation where a party has utterly failed to comply with the appellate rules

[1] This portion of the argument is responsive to points 1 and 3 in the petition for writ of *certiorari*.

despite being given every opportunity to do so. There was no excuse for Petitioners' failure to provide the court of appeals with the appropriate citations in the record to support their argument.[2] The ruling by the court of appeals was not based on a technical defect; Petitioners filed a rambling and disjointed brief in the court of appeals that was not supported by proper citations to either the facts or the law. Numerous courts in the federal system have adopted the same reasoning used by the state court here. *E.g., Mitchell v. General Electric Co.*, 689 F.2d 877 (9th Cir. 1982) (court dismisses appeal for failure to cite court to evidence in record); *McGoldrick Oil Co. v. Campbell, Athey & Zukowski*, 793 F.2d 649 (5th Cir. 1986) (brief stricken for failure to include record citations in statement of facts); *Security and Exchange Commission v. Thomas*, 765 F.2d 825 (10th Cir. 1992) (court not required to manufacture a party's argument on appeal when party has failed to cite court to error in record).

Petitioners claim that the state courts somehow violated their right to due process when the court of appeals applied former TEX. R. APP. P. 74 which requires a party to provide the court proper record and legal citations.[3] That

---

[2] Of course, Mr. Hagans submits that there is a good reason why Petitioners did not comply with Rule 74 in this respect, namely, that the record does not support Petitioners' factual statements in their brief in the court of appeals. Mr. Hagans pointed out several times in his brief that Petitioners' alleged statement of facts was not supported by the record. (*See* Brief for Appellee William Fred Hagans at 16n, 17-18).

[3] The Texas Rules of Appellate Procedure have been amended, but the requirement that a party provide the court with proper citations has not changed. *See* TEX. R. APP. P. 38.1.

requirement is not unique or unusual; in fact, it is critical to a proper review of the case. "Appellate rules governing the form of briefs do not exist merely to serve the whimsy of appellate judges. Some of the requirements, such as what should be included in the statement of the case, are essential for the proper disposition of an appeal." *Slack v. St. Louis County Government*, 919 F.2d 98, 99 (8th Cir. 1990), *quoting Hamblin v. County of Los Angeles*, 803 F.2d 462, 464 (9th Cir. 1986). The court in *N/A Corporation v. Liberty Mutual Insurance Co.*, 127 F.3d 1145, 1146 (9th Cir. 1997), stated the principle in a different way: "In order to give fair consideration to those who call upon us for justice, we must insist that parties not clog the system by presenting us with a slubby mass of words rather than a true brief. Hence, we have briefing rules."

The Court will note that the requirements of former TEX. R. APP. P. 74 are essentially the same as FED. R. APP. P. 28(a)(4). Further, several federal courts of appeals have local rules that emphasize the importance of proper record and legal citations. 4th Cir. L.R. 28(g) (references to record required); 5th Cir. L. R. 28.2.3 (same); 7th Cir. L.R. 28(c) (no fact stated unless supported by record references); 9th Cir. L. R. 28-2.3 (every assertion about matter in record must be supported by reference).

Petitioners filed their original brief on October 4, 1995, after receiving an additional six months to do so from the court of appeals. The original brief directed the court of appeals to the record only once. Petitioners were on notice no later than December 6, 1995 that their brief was deficient under former TEX. R. APP. P. 74 when certain Respondents filed their brief and argued that Petitioners had waived their points of error by failing to provide

proper citations to the record. Mr. Hagans made the same argument when he filed his brief on February 8, 1996.

After receiving permission from the court of appeals, Petitioners filed an amended brief and supplemental record on June 21, 1996, eight months after they filed their original brief. The amended brief did not make any substantial changes except Petitioners made reference to a few pleadings in the record. Petitioners did not support the factual allegations in the brief in any way by record citations. The preliminary statement in the amended brief, which covered nine pages, contained only a single record citation that was a letter that was not a part of the summary judgment proof. Many of the citations in the entire amended brief were to that letter.

The clerk's record in the case, after it was supplemented, contained 16 volumes with over 3,700 pages. The court of appeals correctly concluded that Petitioners waived their claims because they did not direct the court to the "page of the record where the matter complained of is to be found." TEX. R. APP. P. 74(d); *Henry S. Miller Management Corp. v. Houston State Associates*, 792 S.W.2d 128, 133-135 (Tex. App. – Houston [1st Dist.] 1990, writ denied) (court declines to search 651 page transcript and a 1,823 page statement of facts for error); *Johnson v. State Farm Mutual Automobile Insurance Co.*, 762 S.W.2d 267 (Tex. App. – San Antonio 1988, writ denied) (no record references showing preservation of complaint on appeal). The court would have reached the same result under the federal rules. *E.g., Mitchell v. General Electric Co.*, 689 F.2d at 878 (court declines to review 10 days of depositions to "ferret out facts" on which Plaintiff relies).

Mr. Hagans realizes that courts of appeals often accept the burden to search the record when an attorney fails to comply with briefing rules; however, Petitioners' conduct here was such a departure from customary and necessary rules of appellate procedure that the state court of appeals properly declined to undertake that task. This Court should not require any state court of appeals or Respondents as a matter of federal constitutional law to remedy Petitioners' incoherent ramblings, especially when Petitioners had seven months to review the record and provide the lower court with reasonable support for their arguments.

Petitioners do not argue strongly that they complied with former TEX. R. APP. P. 74 when they filed their brief and amended brief in the court of appeals; instead, they: (1) blame the district clerk's office for failing to prepare a proper transcript; (2) blame the court of appeals for not ordering them to amend their brief a second time after oral argument; and (3) blame the court of appeals for not reaching a constitutional challenge that they never raised in the trial court. None of these arguments has merit.

Given the history of the case, and the purpose behind rules of appellate procedure, Petitioners simply cannot show that they were deprived due process when the court of appeals refused to consider arguments not supported by proper record or legal citations.[4] Despite their protests to the contrary, Petitioners were not "in substantial compliance with the rules." (Pet. at 18). In fact, the

---

[4] Petitioners' argument that former TEX. R. APP. P. is unconstitutionally vague is not supported by any legal authority even in this Court. (Pet. at 26-28).

court of appeals gave Petitioners multiple chances to comply with the minimum but necessary "Requisites of Briefs" set forth in former TEX. R. APP. P. 74. The procedural history of this case, as set out in the opinion by the court of appeals and this brief, compels the conclusion that Petitioners were given all the process they were due.

2. Petitioners cannot avoid their duties under former TEX. R. APP. P. 74 by blaming the district clerk.

Petitioners next argue that the District Clerk of Harris County was responsible for Petitioners' waiver of their arguments on appeal.[5] The argument is frivolous because the court of appeals ultimately had the entire record for review. There is no complaint in this Court that the record, as supplemented, was not complete. It may be true that the file from the trial court did not contain all original documents that were relevant on appeal when Petitioners requested the transcript; however, all parties promptly agreed to substitute copies of any relevant pleadings and motions for use by the court of appeals. In its opinion, the court of appeals did not rule that Petitioners had waived their complaints for failure to bring a complete record to the court for review; rather, the court held that Petitioners failed to cite the court to the record that existed. Petitioners cannot shift the blame to the district clerk for their failure to take actions that were completely within Petitioners' control.

---

[5] This argument is responsive to point 2 in the petition for writ of *certiorari*.

Petitioners filed their initial brief in October 1995. Had they reviewed the transcript at that time, and complied with former TEX. R. APP. P. 74 by directing the court to the "page of the record where the matter complained of is to be found," they would have known that there were items missing from the clerk's record. Petitioners waited over a year to supplement the original record and then filed an amended brief that still did not have the proper citations to the record. The error was theirs alone.

Further, under former TEX. R. APP. P. 50(d), Petitioners had the duty to see that an adequate appellate record was brought to the court of appeals.[6] Under Texas law, even if the problem was an inadequate record, rather than inadequate citations to the existing record, Petitioners could not avoid waiver of their complaints by blaming the district clerk. *Guillen v. DeLeon*, 887 S.W.2d 503 (Tex. App. – San Antonio 1994, no writ) (burden on appellant alone, not district clerk, to bring forth record on appeal); *Okere v. Apex Financial Corp.*, 930 S.W.2d 146 (Tex. App. – Dallas 1996, writ denied) (right to appellate review accompanied by a duty to provide adequate record). As a result, Petitioners' attempts to blame the district clerk for their own failure to cite the record properly do not have merit and should be rejected by this Court.

---

[6] Under Rule 35.3(a) of the new Texas Rules of Appellate Procedure, that duty is now with the clerk; however, there is no dispute that the former rules apply to this case. *See Final Approval of Revisions to the Texas Rules of Appellate Procedure* (August 15, 1997).

3. Plaintiffs have no constitutional challenge to the Texas rule on summary judgment.

In their fourth and fifth points, Petitioners claim that the Texas rule on summary judgment, TEX. R. CIV. P. 166a, violates their right to trial by jury. (Pet. at 28). Petitioners implicitly concede they raised this argument for the first time in the state court of appeals, not the trial court. (Pet. at 8). These arguments fail for at least four separate and independent reasons:

(a) Petitioners waived their constitutional challenge by failing to raise it in the trial court. In Texas, as in the federal courts, a party must present an issue to the trial court for ruling in order to claim error on that issue on appeal. *Singleton v. Wulfe*, 428 U.S. 106 (1976); *Dryer v. Greene*, 871 S.W.2d 697 (Tex. 1993); *General Motors Acceptance Corp. v. Harris County Municipal Utility District*, 899 S.W.2d 821, 825 (Tex. App. – Houston [14th Dist.] 1995, no writ); TEX. R. APP. P. 52(a). There is no reason why Petitioners could not have made their constitutional challenge in the trial court at the time the motions for summary judgment were heard. They could and should have included the argument when they filed their responses to the motions. They failed to preserve any error on these issues.

(b) Petitioners have no federal constitutional challenge based on denial of a right to trial by jury because the seventh amendment does not apply to state court proceedings. Petitioners argue that TEX. R. CIV. P. 166a deprived them of their federal constitutional right to trial by jury, but that right in civil cases applies only in federal courts. *Pearson v. Yewdell*, 95 U.S. 294 (1877); *Colgrove v.*

Battin, 413 U.S. 149, 169n (1973) (Marshall, J., dissenting); *Young Brothers & Co. v. Cigna Worldwide Insurance Co.*, 882 F.Supp. 1468 (E.D. Pa. 1994). There is no violation of federal law because federal law does not apply to this case.

(c) Summary judgment does not violate a right to trial by jury. The Texas rule is very similar to the federal rule on summary judgments. *Compare* TEX. R. CIV. P. 166a *with* FED. R. CIV. P. 56. The law is settled that these rules do not violate due process. *See generally* 10A Wright, Miller & Kane, *Federal Practice & Procedure* §§ 2711, 2714 (1998); *Carraba v. Employers Casualty Co.*, 742 S.W.2d 709 (Tex. App. – Houston [14th Dist.] 1987, no writ); *Swafford v. Holman*, 446 S.W.2d 75 (Tex. Civ. App. – Dallas 1969, writ ref'd n.r.e.).

(d) As far as Mr. Hagans is concerned, the Court need not address the issues raised by Petitioners on the validity of the summary judgment procedure. The court of appeals affirmed the summary judgment because Petitioners failed to comply with the rules of appellate procedure. Although Mr. Hagans submits that the summary judgment was proper, the court of appeals did not reach the judgment on the merits. The only issue before the Court here is whether there is a federal due process violation when an appellate court holds that a party waives error under the facts of this case. The court of appeals did not discuss the procedure in the trial court (Appendix A at 8); the opinion dealt mainly with the procedure in the appellate court. The constitutional issue was not decided by the court of appeals.

CONCLUSION AND PRAYER

For the reasons set forth in this brief in opposition, and the opinion by the Texas court of appeals, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

RICHARD A. SHEEHY
McFALL, SHERWOOD & SHEEHY, P.C.
2500 Two Houston Center
909 Fannin Street
Houston, Texas 77010-1003
(713) 951-1000 [Telephone]
(713) 951-1199 [Telecopier]

Attorneys for Respondent
William Fred Hagans